The Need for State-wide Receiving Water Limitation Language

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Representing the Cities
Carson, Compton, Claremont, Duarte, El Monte, Gardena, Glendora, Lomita, Lawndale, Lomita, Pico Rivera, San Fernando, San Gabriel, South El Monte, and West Covina

Consistent RWL Language

- Importance of RWL Language
  - Contains Instructions for MS4 Permit compliance with water quality standards (includes TMDLs)
  - Requires timely and complete compliance with stormwater management plan -- includes six basic programs
    - Development Planning
    - Development Construction
    - Illicit Connection/Discharge Detection and Elimination
    - Industrial/Commercial Inspection
    - Public Agency
    - Public Education Outreach
  - Requires compliance with other permit requirements (e.g., annual report submittals, monitoring, establishing legal authority to compel compliance with program requirements affecting citizens and businesses)
  - If a permittee does all these things, it is in compliance – even if an exceedance occurs

Consistent RWL Language

- Iterative Process – key RWL provision
  - Iterative process (give it your best shot, trial and error process) is triggered in the event of a water quality standard exceedance
    - Requires submitting a report to the Regional Board explaining what BMPs are being implemented to address the pollutant that was exceeded
    - Requires proposing – if necessary – additional or more intense BMPs (from WQ 99-05 based on USEPA's Phase I Interim Permitting Guidelines)
    - As long as the procedure is followed the permittee will be in compliance with water quality standards

Consistent RWL Language

- Iterative process (continued)
  - Problem: 9th Circuit ruled that there is no "textual support" for the existence of the iterative process in the 2001 LA MS4 permit (viz., it's not specifically written) – even though the procedure infers its existence
  - Recommendation: Specify in the revised RWL language that the "if first you don't succeed try again process" is the iterative process

Consistent RWL Language

- Iterative process (continued)
  - The iterative process is not a safe harbor
    - Safe harbor implies that if an exceedance occurs that the RWL iterative process procedure would “forgive” the exceedance
    - There should be no need for forgiveness if a Permittee’s SWMP and other provisions of the MS4 permit are being implemented completely in accordance with a compliance schedule – even if an exceedance occurs (there’s no violation)
    - Recommendation: Forget about safe harbor

Consistent RWL Language

- RWL language is unclear regarding where compliance takes place – outfall or receiving water
  - In NRDC v. LACFCD the 9th circuit ruled that for evidentiary reasons compliance with TMDLs/WQSs cannot be determined in the receiving water but at the outfall – court said:
    - For purposes of evidentiary burden *sample for exceedances at the outfall*
    - Federal regulations (40 CFR 122.26) establish that the end of the regulatory line for an MS4 is the outfall – not the receiving water
  - Recommendation: Specify in the RWL that exceedances may only be detected through outfall monitoring

Consistent RWL Language

- Compliance determined at the outfall must be limited to stormwater discharges only!
  - In NRDC's complaint against the County exceedances included non-stormwater as well as stormwater detected in-stream
    - There is no requirement to control non-stormwater discharges from the MS4 -- controlling discharges ***from*** the MS4 is limited exclusively to stormwater discharges (CWR 402(p)(3)(b)(iii)
    - Unauthorized Non-stormwater discharges are only ***prohibited to the MS4*** (CWA 402(p)(3)(b)(ii)
    - The prohibition of non-stormwater discharges is dealt with through the illicit connection/discharge detection and elimination program
    - Municipal permittees are required to halt the illicit discharge or eliminate the connection through which it passes through its legal authority
    - If the discharge cannot be eliminated, federal regulations require the discharge to obtain permit coverage – but not under the MS4 permit (Federal Register/Vol. 55, No. 222), page 47995

Consistent RWL Language

- Compliance Monitoring
  - Recommendation: Specify in the RWL language that compliance is determined at the outfall and is limited to stormwater discharges

Consistent RWL Language

- Compliance is measured at the outfall against ambient standards, not wet weather ones
  - In NRDC v. LACFCD at issue were exceedances that were detected in the receiving water during storm events
  - Federal regulations only require compliance with TMDLs and other WQSs with the AMBIENT condition of a receiving water
  - TMDLs ambient standards

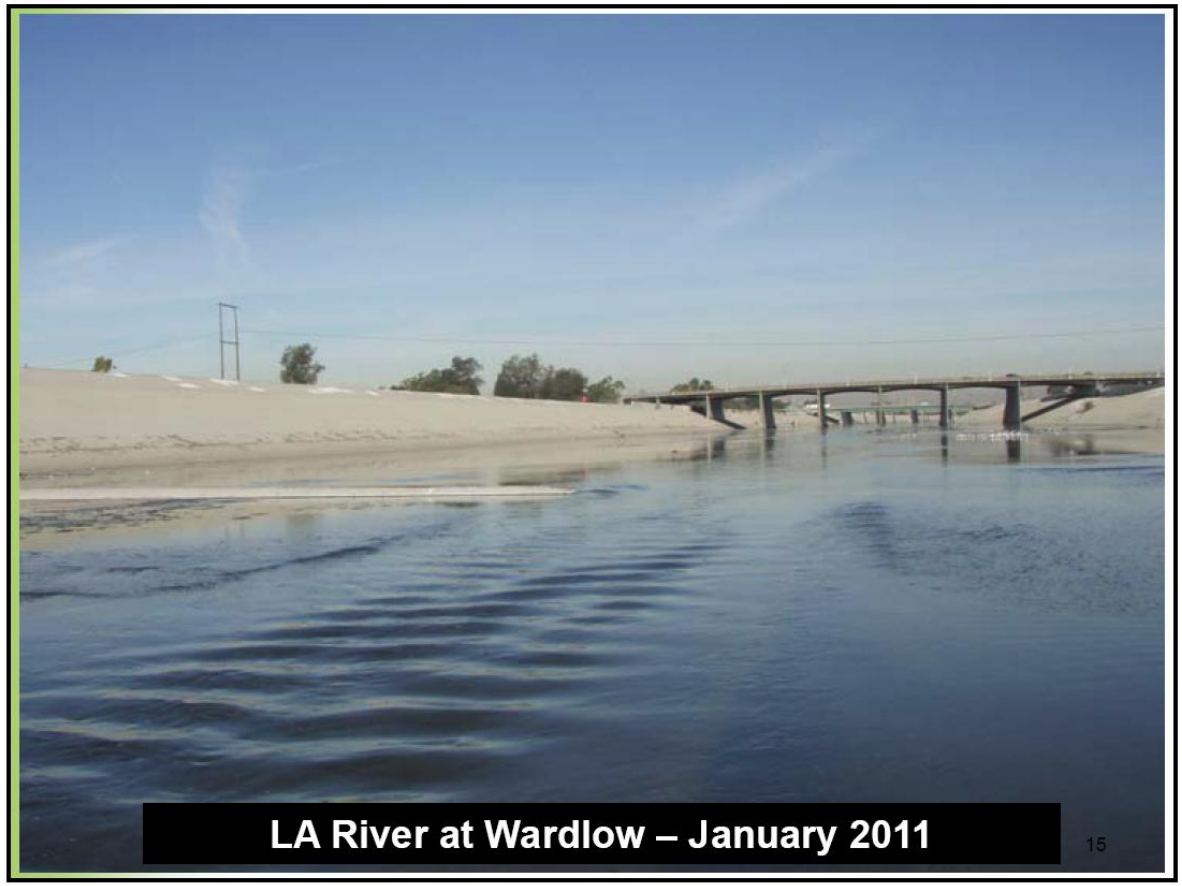
    …EPA is obligated to implement the Total Maximum Daily Load (TMDL) program, the objective of which is attainment of ambient water quality standards through the control of both point and nonpoint sources of pollution

Consistent RWL Language

- Importance of RWL Language
  - The federal definition of ambient monitoring is
    - *Natural concentration of water quality constituents prior to mixing of either point or nonpoint source load of contaminants. Reference ambient concentration is used to indicate the concentration of a chemical that will not cause adverse impact to human health.*
    - "natural concentration of water quality constituents" cannot occur in a receiving water when it rains. This is because the highest concentration of pollutants occurs during the first six hours of a storm event
    - The ambient standard establishes what is necessary to protect the beneficial uses of receiving waters
    - The ambient standard is a reference point against which outfall stormwater discharges are measured
    - Using an ambient standard allows an MS4 permittee to determine its pollutant contribution to a receiving water and to "adjust" its stormwater quality management plan and BMPs to focus on the exceedance through the iterative process

Consistent RWL Language

- Example of an Ambient Sampling Point (48 hours after a storm event)

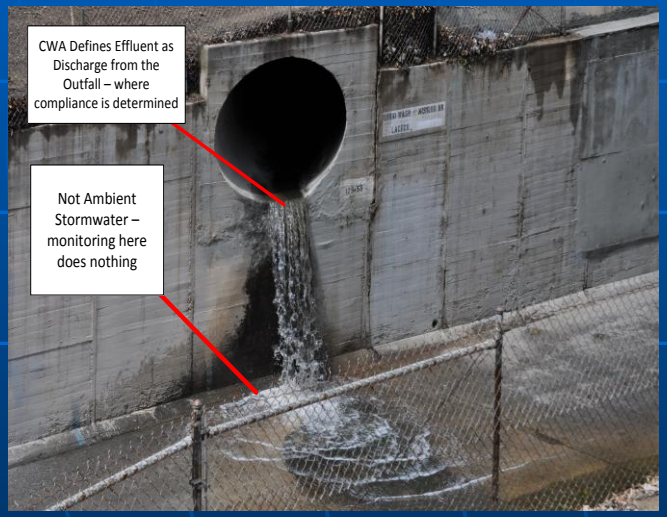


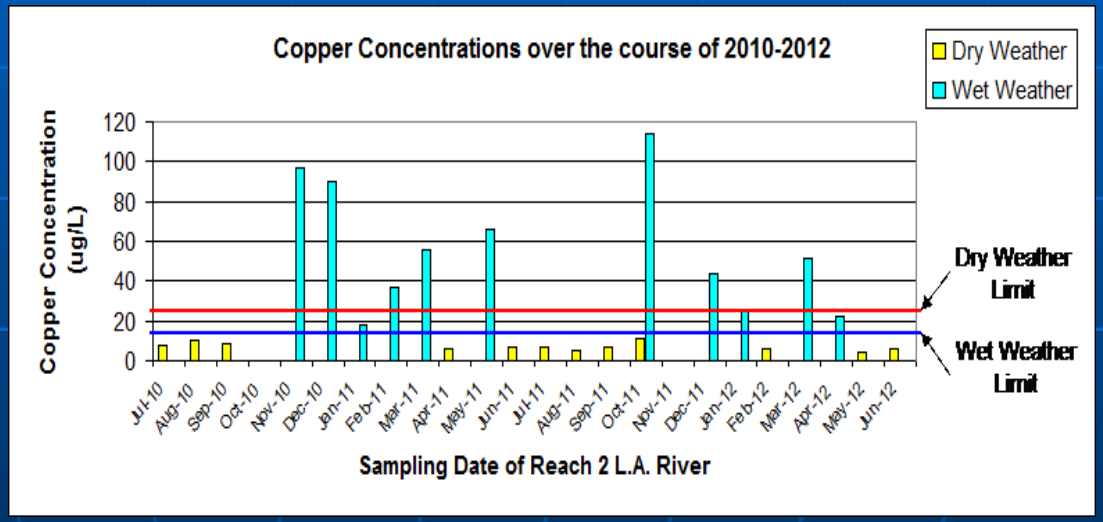
Consistent RWL Language

- Example of a Non-Ambient/Wet Weather Sampling Point
- Worse time to sample because the highest concentration of pollutants occurs within 6 hours of a storm event – water body is in a chaotic state
- Says nothing about beneficial use protection (drinkable, fishable, swimmable?)
- SWAMP protocol does not require monitoring during storm events, only during dry periods

Consistent RWL Language

- Importance of RWL Language
  - Comparing outfall discharges against wet-weather standards will most likely result in exceedances





Consistent RWL Language

- Graph shows consistent exceedances for copper wet weather standard well above the wet weather standard (average of 80 ug/l above the 17 ug/l wet weather limit) – this standard can never be met
- Worse time to sample because the highest concentration of pollutants occurs within 6 hours of a storm event
- Says nothing about beneficial use protection (can't be drinkable, fishable, swimmable in a chaotic state)
- SWAMP protocol does not require monitoring during storm events, only during dry periods
- Also shows consistent compliance with dry weather standard (12 ug/l)

Consistent RWL Language

- Recommendation: Specify that outfall monitoring for stormwater discharges is to be measured against “ambient” dry weather standards

Consistent RWL Language

- Questions/Comments?